

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VIROPRO, INC., a Nevada Corporation,

Plaintiff,

v.

MAYER AMSEL, an individual, JERSEY  
TRANSFER AND TRUST CO., and DOES I  
through X,

Defendants.

02:06-cv-01367-LRH (GWF)

ORDER

Presently before this court is Plaintiff Viropro, Inc.'s motion for sanctions based on Defendant Mayer Amsel's improper removal of the underlying matter to federal court (#10<sup>1</sup>). Defendant has filed an opposition (#13). No reply has been filed.

The court previously remanded this case to state court for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c). Under that statute an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The United States Supreme Court has held that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 126 S.Ct. 704, 711 (2005). However, "district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Id.* Such unusual circumstances include delay in seeking remand or failure to

<sup>1</sup> References to (#XX) refer to the court's docket.

1 disclose facts necessary to determine jurisdiction. *Id.*

2 In this case, the court first notes that there was no objectively reasonable basis for  
3 removal. Looking at the claims brought, there were no grounds to suggest diversity jurisdiction,  
4 as existed in *Martin*, and there were no federal questions presented in the claims. Rather, as  
5 Defendant admitted, removal occurred because of the existence of a separate case which had  
6 already been filed by Defendant in federal court. It was Defendant's belief that the claims  
7 brought in the state court case were mirror images of the federal claims and should therefore be  
8 removed to federal court so they could be consolidated with the already pending matter.

9 The court notes that while this argument explains Defendant's actions, it does not  
10 demonstrate an objective basis for removal. In *Martin*, the Supreme Court found an objective  
11 basis for removal when diversity jurisdiction appeared appropriate but there could be no  
12 definitive determination of the amount in controversy requirement. *Id.* at 708-09. Looking at the  
13 state court proceedings, there are no objective factors present which would suggest removal  
14 would be appropriate. Rather, Defendant subjectively believed that the state case should be  
15 consolidated with the federal case already pending. Defendant thus removed for the purpose of  
16 facilitating the consolidation believing that subject matter would be present because of the  
17 interplay between the two cases. Accordingly, as no objective factors are present, the court may  
18 award fees unless unusual circumstances exist.

19 Upon review, however, it appears to the court that there exist such unusual circumstances  
20 as to justify the court in denying fees for improper removal. The court notes that Plaintiff  
21 proceeded, upon removal, as if removal had been proper. Accordingly, Plaintiff began preparing  
22 for a hearing on the temporary restraining order that had been entered in state court and was set  
23 to expire shortly before the case was removed. At no time did Plaintiff attempt to have the case  
24 remanded based on a lack of jurisdiction. In fact, jurisdiction was raised only by the court *sua*  
25 *sponte*.

26 Further, upon argument regarding the court's subject matter jurisdiction Plaintiff  
27 appeared to have expected jurisdiction to be valid. All these events are understandable given that  
28 much of the state law claims were related to the federal case already proceeding. However, given

1 that the court raised the issue of jurisdiction *sua sponte* and Plaintiff was not required to invest  
2 substantial amounts of time or briefing to discover and cure the improper removal to federal  
3 court, the court concludes that this is one of those cases where unusual circumstances make an  
4 award of fees for improper removal inappropriate. *See id.* at 711 (noting that a Plaintiff's delay  
5 in seeking remand could constitute unusual circumstances). Further, given the reasonable  
6 subjective beliefs for removal argued by Defendant, the court concludes that it is not against the  
7 purposes behind 28 U.S.C. § 1447(c) to deny a fee award in this instance. *See id.* (noting the  
8 desire of the statute was to deter removals sought for the purpose of prolonging litigation and  
9 imposing costs on the opposing party while at the same time protecting a party's right to  
10 remove).

11 It is therefore ORDERED that Plaintiff's motion for sanctions (#10) is DENIED.

12 DATED this 4<sup>th</sup> day of January, 2007.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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